

# 2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

## CHAPTER 8

### ARGUMENTS

#### Table of Contents

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. WHEN COUNSEL MAY ARGUE. ....</b>	<b>1</b>
A. Argument on Motions.....	1
B. Opening Statement.....	1
C. Findings Argument.....	1
D. Sentencing Argument.....	2
E. Waiver of Argument.....	2
F. Length of Argument. ....	2
<b>III. FINDINGS ARGUMENTS. ....</b>	<b>3</b>
A. Permissible Argument.....	3
B. Common Errors.....	3
<b>IV. SENTENCING ARGUMENTS.....</b>	<b>8</b>
A. Permissible Argument.....	8
B. Common Errors.....	11
<b>V. REMEDIES FOR IMPROPER ARGUMENT. ....</b>	<b>16</b>
A. Military Judge Can Sua Sponte Stop the Argument.....	16
B. Military Judge Can Give a Curative Instruction .....	16
C. Military Judge Can Require a Retraction from Counsel.....	16
D. Military Judge Can Declare a Mistrial.....	16
E. Counsel Must Cease Argument Once Judge Rules on Issue .....	16
<b>VI. WAIVER. ....</b>	<b>16</b>
<b>VII. CONCLUSION. ....</b>	<b>17</b>

**MAJ Tim MacDonnell  
December 2000**



# **2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE**

## **ARGUMENTS**

### **Outline of Instruction**

#### **I. INTRODUCTION.**

#### **II. WHEN COUNSEL MAY ARGUE.**

- A. Argument on Motions. Upon request, either party is entitled to have an Article 39(a) session to present oral argument concerning the disposition of written motions. R.C.M. 905(h).
- B. Opening Statement.
  - 1. Timing. Each party may make one opening statement to the court-martial before the presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested or before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times. R.C.M. 913(b)
  - 2. Argument prohibited. Counsel should confine their remarks to evidence they expect to be offered and a brief statement of the issues in the case. Discussion, R.C.M. 913(b).
- C. Findings Argument. After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal. R.C.M. 919.

- D. Sentencing Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and the defense may argue for an appropriate sentence. R.C.M. 1001(g).
1. The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F). *See United States v. McGee*, 30 M.J. 1086 (N.M.C.M.R. 1989). As a general rule, there is no right of government counsel to present rebuttal argument. The propriety of permitting such argument is dependent upon the need to address matters newly raised by the defense in its sentencing argument.
  2. Absent "good cause" the military judge should not permit departure from the order of argument set forth in R.C.M. 1001(a)(1).
    - a. *United States v. Budicin*, 32 M.J. 795 (N.M.C.M.R. 1990). Military judge erred by allowing trial counsel to argue last but defense counsel waived error by not objecting.
    - b. *United States v. Martin*, 36 M.J. 739 (A.F.C.M.R. 1993). Trial counsel should not be routinely permitted to choose whether to argue first or last on sentencing.
- E. Waiver of Argument. Defense counsel should not waive the right to argue.
1. *United States v. McMahan*, 21 C.M.R. 31 (C.M.A. 1956). Defense counsel has a right and duty to argue.
  2. *United States v. Sadler*, 16 M.J. 982 (A.C.M.R. 1983). Defense counsel may only waive argument for "good cause."
- F. Length of Argument.

1. There is no fixed rule on the length of argument. *United States v. Gravitt*, 17 C.M.R. 249 (C.M.A. 1954). Length of argument within discretion of military judge.
2. The military judge may not arbitrarily limit the defense counsel's argument. *United States v. Dock*, 20 M.J. 556 (A.C.M.R.), *pet. denied* 21 M.J. 159 (C.M.A. 1985).

### III. FINDINGS ARGUMENTS.

#### A. Permissible Argument.

1. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case. R.C.M. 919(b).
2. Counsel may comment on the testimony, conduct, motives, and evidence of malice of witnesses.
3. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them.

#### B. Common Errors.

1. Counsel may not make inaccurate reference to law (elements, burden of proof, etc.). *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). During argument trial counsel presented a list of facts court would have to find before the panel could find the accused innocent. This was error but was not prejudicial, given lack of defense objection and judge's curative instruction when a court member asked the trial counsel to repeat some of the list.
2. Counsel may not cite legal authority to court with members. *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958). It was error for trial counsel to read from case in the Court-Martial Reports.

3. Counsel not to argue command policies. *United States v. Thomas*, 44 M.J. 667 (N.M.Ct.Crim.App. 1996). Trial counsel argued in drug case that “the CNO . . . has a zero tolerance policy for anyone who uses any kinds of drugs.” Court found TC reference improper, and noted, “references to command or departmental policies have no place in the determination of an appropriate sentence in a trial by court-martial.” Error for military judge not to give instruction, even though defense counsel failed to object.
4. Counsel may not refer to irrelevant matters. During findings argument, the authorized sentence is generally irrelevant. *But see United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986). Defense counsel should have been permitted to inform members of mandatory minimum life sentence to impress seriousness of offense upon them. However, error was not prejudicial.
5. Counsel may not argue facts not in evidence.
  - a. Demeanor of non-testifying accused is not evidence.
    - (1) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman".
    - (2) *But see United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.
  - b. It is error for counsel to include inadmissible hearsay in findings argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).
  - c. Counsel may argue facts of other cases which are generally known. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981).

6. Counsel may not argue the lack of evidence after a successful suppression motion. *See ABA Standards for Criminal Justice*, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist."
  
7. Counsel may not argue personal belief.
  - a. Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977).
  
  - b. Counsel may not express personal belief as to truth or falsity of evidence or testimony. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).
  
  - c. Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980). Trial counsel's repeated use of term "I think" during argument was improper.
  
  - d. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).
  
8. Trial counsel may not comment on the accused's exercise of any fundamental right. *Griffin v. California*, 380 U.S. 609 (1965).
  - a. Trial counsel may not comment on accused's invocation of right to counsel and right to remain silent.
    - (1) *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.

- (2) *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985). Government may not bring to attention of trier of fact that an accused invoked right to remain silent and consulted with attorney.
- b. Trial counsel may not comment on accused's failure to testify.
  - (1) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses.
  - (2) *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and that government case was uncontroverted was impermissible comment on accused's election not to testify.
- c. Trial counsel may not comment on accused's failure to call witnesses.
  - (1) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses.
  - (2) *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). Trial counsel's improper comment on accused's failure to produce witness was not prejudicial because defense argued that missing witness would testify favorably to accused.

- (3) *But see United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.
- 9. Counsel may not seek to inflame passions of the court.
  - a. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). By characterizing accused as a prurient sex fiend and a deviant pervert, trial counsel urged the members to cast aside reason.
  - b. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989). Court upheld trial counsel's argument comparing the accused to three well-known television evangelists, stating "A criminal trial is not a tea dance."
  - c. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down.
- 10. Counsel may not argue evidence beyond its limited purpose. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.
- 11. Counsel may not make racist comments. *United States v. Lawrence*, 47 M.J. 572 (N.M.Ct.Crim.App. 1997). Trial counsel's rebuttal argument referring to testimony by the accused and his "Jamaican brothers" was plain error and was unmistakably pejorative, even if trial counsel did not intend to evoke racial animus.

## IV. SENTENCING ARGUMENTS.

### A. Permissible Argument.

1. Counsel may recommend a specific lawful sentence.
  - a. Trial counsel may argue for a specific sentence. R.C.M. 1001(g). *United States v. Capps*, 1 M.J. 1184 (A.F.C.M.R. 1976). It is permissible for trial counsel to inform members of maximum penalty which court-martial may impose.
  - b. Defense counsel may argue for a specific sentence. *United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991). Defense counsel's argument was held to be proper, although confusing, where he argued "And, members of the court, seven or eight or nine years of punishment is not minor punishment. Is that really necessary in this case? We submit not. We submit that six or seven or eight or nine years might be, in fact, reasonable and just . . ."
2. Counsel may mention sentencing philosophies.
  - a. Trial counsel may refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).
  - b. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). General deterrence is a proper subject of argument, though not to the exclusion of other relevant sentencing factors.

3. Counsel may comment on matters introduced pursuant to R.C.M. 1001(b):
  - a. Character of service.
  - b. Prior convictions.
  - c. Aggravation - impact of crime.
  - d. Extenuation and mitigation.
  - e. Rehabilitative potential.
4. Trial counsel may comment on the accused's testimony.
  - a. Commenting on the accused's false testimony on the merits.
    - (1) Willful, materially false testimony by accused may be considered in sentencing. *United States v. Grayson*, 438 U.S. 41 (1978); *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982) (applies Grayson standard to the military); *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985), *pet. denied* 22 M.J. 345 (C.M.A. 1986) (military judge properly gave the "mendacious accused" instruction over defense objection).
    - (2) Trial counsel may comment on the accused's false testimony. *United States v. Standifer*, 31 M.J. 742 (A.F.C.M.R. 1990). Trial counsel's argument based on accused's failure to "accept responsibility for his actions" was proper mendacious accused argument, although it came dangerously close to improper comment on accused's failure to admit guilt.

- b. Commenting on the accused's unsworn statement in extenuation and mitigation. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981) (it is permissible to contrast unsworn statement with one made under oath). *But see United States v. Brown*, 17 M.J. 987 (A.C.M.R. 1984).
  - c. Commenting on the accused's lack of remorse.
    - (1) Trial counsel may comment on the accused's lack of remorse if the accused has either testified or has made an unsworn statement and has either expressed no remorse or his expressions of remorse can be arguably construed as being shallow, artificial, or contrived. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992).
    - (2) *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). Trial counsel's comment that the accused did not "acknowledge [the] finding of guilty" in his unsworn statement was not plain error. Such argument may be a proper comment on the accused's lack of remorse.
    - (3) *But see United States v. Chaves*, 28 M.J. 691, 693 (A.F.C.M.R. 1989). Military judge instructed that absence of a statement of remorse may be considered as an aggravating factor for sentencing where accused made an unsworn statement but did not discuss crime. Held: instruction was error but harmless.
- 5. Counsel may argue common sense. *United States v. Frazier*, 33 M.J. 260 (C.M.A. 1991). It was permissible to argue potential lethal use of claymore mines in the civilian community.
- 6. Effect of pretrial agreement.

- a. Counsel may generally argue for any legal sentence regardless of limitations contained in a pretrial agreement. *United States v. Rivera*, 49 C.M.R. 838 (A.C.M.R. 1975); *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).
- b. Counsel may not make misleading arguments. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992)(finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement).

B. Common Errors.

1. Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).
2. Trial counsel may not argue command policies. R.C.M. 1001(g). *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983). Military judge had sua sponte duty to correct counsel's improper comments on Strategic Air Command policies on drugs.
3. Trial counsel may not mention the convening authority.
  - a. Trial counsel may not purport to speak for the convening authority or any higher authority, or refer to the views of such authorities. R.C.M. 1001(g).
  - b. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). It was improper for the trial counsel to mention the convening authority by name and then to tell the members to "do the right thing."

- c. *United States v. Simpson*, 12 M.J. 732 (A.F.C.M.R. 1981), *pet. denied*, 13 M.J. 480 (C.M.A. 1982). It was error for trial counsel to argue that referral to special court-martial was exercise of clemency by convening authority.
- 4. Trial counsel may not mention an accused's exercise of a fundamental right.
  - a. Right to plead not guilty. *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990). It was impermissible for trial counsel to argue that accused should not be considered for rehabilitation because he had failed to admit his responsibility by pleading not guilty.
  - b. Right to confront witnesses. *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987). Trial counsel may not argue the adverse impact flowing from the accused's exercise of his constitutional rights to confront and cross-examine witnesses against him.
- 5. Counsel may not argue evidence beyond its limited purpose. *United States v. White*, 36 M.J. 306 (C.M.A. 1993). In trial for drug use based on positive urinalysis, it was permissible for trial counsel to cross-examine defense character witness regarding uncharged second positive urinalysis, but trial counsel erred by arguing that accused abused drugs twice.
- 6. Counsel may not improperly incite passions.
  - a. Counsel may not ask members to place themselves in position of victim. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993) (trial counsel may ask members to "imagine the fear of the victim".)

- b. Counsel may not refer to accused in *unduly* demeaning terms.
    - (1) *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.
    - (2) *But see United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.
  - c. Counsel may argue impact of sentence. *United States v. Moody*, 10 M.J. 845 (N.C.M.R. 1981), *pet. denied*, 11 M.J. 348 (C.M.A. 1981). When defense counsel asks court to consider impact of sentence on accused's family, trial counsel may, on rebuttal, ask court to consider impact on victim's family.
  - d. Counsel may not appeal to personal interests of sentencing authority. *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985). It was improper for trial counsel to ask the military judge if he wanted the accused walking the streets of the judge's neighborhood.
7. Defense counsel may not argue for reconsideration. *United States v. Vanderslip*, 28 M.J. 1070 (N.M.C.M.R. 1989). The fact that members may reconsider findings does not authorize a request for reconsideration.
8. Counsel may not argue facts not in evidence.
- a. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990). Where the government allowed an accused to plead guilty as an aider and abettor in providing the gun to actual shooter, it could not then argue that the accused pulled the trigger.

- b. *United States v. Shoup*, 31 M.J. 819 (A.F.C.M.R. 1990). Trial counsel improperly mentioned facts not in evidence by arguing to the military judge "This is the third drug case you have heard this week; there were many before and there will be many more in the future...Over twenty people died in Panama a few weeks ago trying to stop drugs from coming into this country."
  - c. Counsel may not argue unreasonable inferences. *United States v. Spears*, 32 M.J. 934 (A.F.C.M.R. 1991). Trial counsel's argument that an inspection which revealed a missing meal card had an impact on the entire unit was not a reasonable inference.
  - d. Counsel may not provide advice on "the average sentence." *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel improperly explained that "average" sentence was mathematical average between no punishment and the possible maximum punishment.
  - e. Counsel may not argue impact on unit or service absent evidence accused's crimes affected duty. *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel's argument in drug case that "[w]e're going to find out who uses drugs when a plane crashes" was improper where the accused's duty was to clean airplanes and there was no evidence that appellant's use of amphetamines affected his duty.
  - f. Counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.
9. Defense counsel may not argue for a punitive discharge unless the accused consents.

- a. The accused's consent must be indicated on record. *United States v. Holcomb*, 43 C.M.R. 149 (C.M.A. 1971); *United States v. Williams*, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents); *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987) (erroneous argument urging judge to adjudge a suspended discharge, despite accused's desire to remain in the service, held not to be prejudicial).
  - b. The military judge should question the accused to determine whether he concurs with defense counsel's argument for a discharge. *United States v. McNally*, 16 M.J. 32, 35 (C.M.A. 1983) (Cooke, J. concurring).
  - c. The military judge need not question the accused if a discharge is highly likely. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983).
  - d. Defense counsel may argue only for a bad-conduct discharge, not a dishonorable discharge or "a punitive discharge." *United States v. Dotson*, 9 M.J. 542 (C.G.C.M.R. 1980) and *United States v. McMillan*, 42 C.M.R. 601 (A.C.M.R. 1970).
10. Trial counsel may not argue for a punitive discharge based on the needs of service. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). Trial counsel improperly blurred distinction between a punitive discharge and administrative separation by arguing "would you really want this individual working for you? I don't think so. . . . Is this really the individual . . . that we need in the United States Air Force?."

11. Counsel may not make racist arguments. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."

## **V. REMEDIES FOR IMPROPER ARGUMENT.**

- A. Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).
- B. Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980).
- C. Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).
- D. Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986), *pet. denied* 23 M.J. 266 (C.M.A. 1986).
- E. Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

## **VI. WAIVER.**

- A. The Waiver Rule. Failure to object to improper argument constitutes waiver. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).
  1. Waiver with respect to findings argument. R.C.M. 919(c).

- a. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Where three possible objections to argument existed and defense counsel only made one, other two were waived.
  - b. An objection by opposing counsel is the most appropriate response to an erroneous argument. *See United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).
2. Waiver with respect to sentencing argument. R.C.M. 1001(g); *United States v. Desiderio*, 30 M.J. 894 (A.F.C.M.R. 1990). Defense counsel's failure to object during trial counsel's argument constituted waiver, even though defense counsel stated in his argument, "Now I didn't say anything during [trial counsel's] argument as he stood up and talked about the impact of drug use on the mission and that kind of thing. It probably was objectionable . . ."
3. The Plain Error Exception. Failure to object does not waive plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987). *See also United States v. Young*, 470 U.S. 1 (1985); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). In order to constitute plain error, the error must:
  - a. Be obvious and substantial; and
  - b. Have had an unfair prejudicial impact.
4. *But see United States v. Thompson*, 37 M.J. 1023, (A.C.M.R. 1993): prejudice is not always necessary. Trial counsel's racist sentencing argument was found to be plain error, despite the fact that it did not prejudice the accused's sentence.

## VII. CONCLUSION.